

WebMemo



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NLRB Organizing Elections Favor Unions, Not Employers

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Labor activists argue that the government supervised secret ballot election process unfairly favors employers. They claim that even when employers follow the law, the system favors employers who want to remain union-free.¹ But in reality, the current election laws favor union organizers, not employers. Federal law severely restricts what employers may say and do during an organizing election, while placing few limits on union activity. Unions consequently win most secret ballot organizing elections.

Citing the unfairness of the election process, unions argue that Congress should replace private ballot elections with card checks conducted in public. Congress should reject this misleading argument and act to protect the right of American workers to vote in privacy before joining a union, not to strip them of their privacy.

No Warning of Layoffs. Organizing election law favors unions in many ways. During a political election campaign, both sides warn voters of the harmful consequences that they believe will occur if they lose. But this is not so in an organizing election. The government heavily restricts what employers may tell their workers will happen if the union wins.

Companies may not tell workers that a union victory would force them to close the plant, outsource jobs, or take any action that would harm workers.² The National Labor Relations Board (NLRB) considers such statements threats of reprisals. Even if it is true that union demands would lead to plant closures and layoffs, an employer may not communicate this to its workers. An employer may

base predictions only on events wholly outside its control, which is rarely the case for layoffs.

Labor organizers, however, may freely warn workers about what they believe will happen if the workers do not unionize. Organizers may and do predict that workers will lose wages or benefits without union representation.³ Since unions do not directly control workers' wages or employment, the government does not consider these statements credible threats. The government prohibits unions only from threatening workers with physical violence.⁴

No Promised Benefits. Only unions may promise benefits to workers if they win the vote. During an election campaign, an employer may not promise to raise wages, improve benefits, or otherwise improve working conditions if workers choose to remain non-union. Nor may employers give their workers raises unless they can prove they planned to do so before the election started.⁵

Unions face no such restrictions. The NLRB allows unions to promise workers raises, health benefits, and other improvements in working conditions. Unions may even promise large raises that they could not possibly fulfill during collective bargaining.⁶

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No Grievance Solicitation. During an organizing drive, employers generally may not ask their workers about their concerns with the company or what they would like to see changed. The NLRB believes that soliciting grievances implies a promise to correct them if the union loses.⁷ Like promising workers benefits, this is also illegal. Unless a company has a longstanding policy of soliciting grievances from workers, it may not start doing so during an organizing election. Unions, on the other hand, are free to ask workers what they do not like about their jobs and promise to fix these issues during collective bargaining.

No Asking About Union Support. When a political campaign knows who its supporters are, it can focus its efforts on persuading undecided voters. In organizing campaigns, however, the government prevents employers from asking their employees if they support joining the union. An employer may not ask if a worker has attended a union meeting, signed a union card, or seen any other workers do so.⁸ The NLRB considers this interrogation.

The government also prohibits most other methods employers might use to discern workers' views on unionizing. Employers may not take note of who attends union meetings, follow union supporters after work, record union meetings, or give the impression of doing any of these things. The NLRB prevents employers from "spying" on workers to determine who supports the union.⁹

Unions, on the other hand, are free to question workers about their union sympathies. Unlike employers, during NLRB elections, unions may ask workers how they plan to vote and, thereby, focus their efforts on persuading workers who do not want to join.

Unions Control Election Timing. The timing of an election can make a large difference in its outcome. Election law clearly favors unions in this regard, because they have almost sole control over when the government holds elections. Unions, not employers, decide when to submit the election petitions that start the NLRB election process.¹⁰ Consequently, organizing elections occur when union support is at its strongest.

If a union believes most employees will vote against organizing, it usually holds off calling for a vote until it can win more support. If a union has called for an election and realizes it will lose, it may simply withdraw its petition and cancel the vote.¹¹ The union can call for an election later, once it gains more support.

Employers, on the other hand, may call for an election only if a union has "requested recognition" as the workers' collective bargaining representative.¹² Because unions are careful not to do this until they believe they are likely to win the election, in practice, employers have little control over when the NLRB holds an election.¹²

1. John Sweeney, "Out Front With John Sweeney: Management Controlled Election-Process," AFL-CIO, at www.aflcio.org/aboutus/thisistheafcio/outfront/managementcontrolledballoting.cfm (April 3, 2007).
2. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, July 2005, Chapter 24, Sections 210–230, at www.nlr.gov/nlr/legal/manuals/outline_chap24.html.
3. *Ibid*, Section 320.
4. Robert P. Hunter, "Michigan Labor Law: What Every Citizen Should Know," Mackinac Center Report, August 1999, pp. 38–39. Available online at <http://www.mackinac.org/archives/1999/s1999-05.pdf>.
5. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, July 2005, Chapter 24, Section 320, at www.nlr.gov/nlr/legal/manuals/outline_chap24.html.
6. *Ibid*.
7. Edward Young and William Levy, "Responding to a Union Organizing Campaign," *Franchising World*, March 2007, p. 47, at <http://www.bakerdonelson.com/Documents/Responding%20to%20a%20Union%20Organizing%20Campaign%200307.pdf>.
8. *Ibid*, p. 46.
9. Robert P. Hunter, "Michigan Labor Law: What Every Citizen Should Know," Mackinac Center Report, August 1999, p. 38. Available online at <http://www.mackinac.org/archives/1999/s1999-05.pdf>.
10. *Ibid*, Chapter 7.
11. *Ibid*, Chapter 8.

Access to Company Premises. Union activists frequently complain that employers have access to workers for 40 hours a week, while they do not. They particularly object to what they label “captive audience” meetings that employers require employees to attend, where supervisors explain the downsides of joining a union. Thus, they contend, employers have an unfair opportunity to present their case to workers.

But labor activists ignore the rest of the law in making this claim. The government requires companies to pay workers full wages during “captive” meetings, making such meetings very expensive.

The law allows employees who support unionizing to campaign for the union at the workplace when they are not on the clock. It also requires companies to let union organizers freely recruit workers during non-work hours, unless the company has a general policy against soliciting on its premises.¹³ The one thing the law does allow companies to do is to prohibit union campaigning in the workplace when workers are on company time—hardly an unreasonable restriction.

Unions May Campaign at Workers’ Homes.

To provide union organizers with greater access to workers, the government requires companies to give union organizers a complete list of the names and addresses of all employees once a union calls for an election.¹⁴ Union organizers use these lists to visit workers at their homes and persuade them to support the union. Employers, however, may not make such home visits.¹⁵ Employers’ only opportunity to communicate with workers is during work hours.

Unions Win Most Elections. Unsurprisingly, given the advantages they enjoy over employers, unions win most NLRB organizing elections. Unions won 61 percent of union certification elections held in 2005.¹⁶ Nonetheless, labor unions want Congress to pass card check legislation—not because NLRB elections stack the deck against union organizers but because unions are even more likely to win when workers’ votes are cast in public. Unions successfully organize new dues-paying members over 80 percent of the time when publicly signed cards replace private ballots.¹⁷

Conclusion. Union claims that government supervised secret ballot elections favor employers are false. The secret ballot election procedures overwhelmingly favor unions. Employers may not warn workers that unionizing could cause business setbacks and may not promise to improve working conditions if the union loses. Employers may not ask workers what they dislike about their jobs or how they plan to vote.

Unions face no such restrictions. Not only do they control the timing of the election, but also they are free to threaten that workers will lose their jobs without a union, to promise raises they cannot deliver, to interrogate workers about their support of the union, and to campaign at workers’ homes. Unions consequently win approximately three-fifths of all organizing elections. Union arguments about the unfairness of organizing elections are highly misleading. Congress should resist organized labor’s assault on workplace democracy and protect workers’ right to vote in privacy.

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12. *Ibid.*, Chapter 7.

13. *Ibid.*, pp. 36–37.

14. National Labor Relations Board, Office of the General Counsel, *An Outline of Law and Procedure in Representation Cases*, July 2005, Chapter 24, Section 324, at www.nlr.gov/nlr/legal/manuals/outline_chap24.html.

15. *Ibid.*, Section 321.

16. National Labor Relations Board, *Seventieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30 2005*, May 1, 2006, Table 13: Total RC elections, at www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2005Annual.pdf.

17. Adrienne E. Eaton and Jill Kriesky, “Union Organizing under Neutrality and Card Check Agreements,” *Industrial and Labor Relations Review*, Vol. 55, No. 1 (Oct., 2001), Table 3, mean percentage of campaigns resulting in recognition by agreement, page 52.